

FACTUAL HISTORY

On April 14, 2017 appellant, then a 55-year-old motor vehicle operator and shop steward, filed a traumatic injury claim (Form CA-1) alleging that he sustained work-related physical injuries to his cheek, jaw, ribs, head, and left ear on March 16, 2017. He alleged that he was assaulted by R.C., an employee, while talking to him about his grievances. Appellant stated that it was unclear why R.C. assaulted him.

In a March 16, 2017 medical report, Dr. James Alexander, a Board-certified family practitioner Board-certified in occupational medicine, noted that appellant, a shop steward, had an altercation at work about two hours ago where he was struck by a fist in left jaw, left side of head, and left lateral chest wall. He diagnosed contusion of scalp, unspecified injury of other part of head, contusion of left ear, contusion of face and neck except eyes, and contusion of chest wall. In a March 23, 2017 duty status report, Form CA-17, Dr. Alexander released appellant from medical care to full-time work.

In a March 20, 2017 note, Sheila D. Robinotte, LPC, a mental health therapist, indicated that appellant was undergoing individual therapy for anxiety and depressive thoughts related to adjustment issues regarding a recent assault.

In an April 24, 2017 development letter, OWCP advised appellant of the deficiencies in his claim. It requested that he submit additional factual and medical evidence in support of his claim for a March 16, 2017 work injury. It provided him a questionnaire form containing questions to be answered about his claimed injury. OWCP afforded appellant 30 days to submit the necessary evidence.

By letter dated April 24, 2017, OWCP also requested that the employing establishment provide further information regarding the alleged assault.

A March 20, 2017 investigative memorandum by G.N., a postal inspector, summarized March 16, 2017 interviews regarding the physical altercation which took place at approximately 12:08 p.m. between appellant and R.C., both motor vehicle operators. He indicated that both appellant and R.C. were placed in an emergency off duty/without pay status effective March 16, 2017 as a result of the physical altercation. They were also evaluated for treatment of their injuries. Copies of the March 16, 2017 interviews were provided.

In his interview, appellant indicated that he was a shop steward and had to speak to R.C. regarding a grievance he had filed. He indicated that R.C. sat down in a chair and that he was standing and had started to read a text on his telephone from a union representative when R.C. knocked the telephone out of his hand. As appellant bent over to pick up the telephone, R.C. hit him on the left side of his face with a closed fist. They then wrestled each other to the ground and he yelled for help.

In his interview, R.C. stated that two to three weeks prior, management started to change routes and that he went to appellant, who was his union representative, to question the changes. He indicated that appellant stated, "If you don't like it, you can quit" and that a verbal exchange followed. Shortly after that, appellant drove by R.C. near the docks, released his air brakes, and

yelled out the window that he would do what “Pringles should have done and kick his ass.” R.C. stated that appellant drove off, turned around and came back when he was talking to a coworker and yelled at him again. He did not report the incidents, but wrote down a couple of sentences about the incidents which he shared with L.E, another union steward. R.C. stated that, after he clocked in on March 16, 2017, appellant told him he needed to talk to him. Appellant then placed a cell phone in his face and appellant made a physical move towards him. R.C. alleged that the next thing he knew, they were rolling around on the floor until somebody came into the room and broke up the confrontation.

D.H., a witness and coworker, indicated that he heard hollering and he then walked into the room where R.C. was on his back on the ground pulling appellant towards him. Appellant’s telephone was on the floor next to them. The left side of appellant’s face had been struck. D.H. stated that he was able to separate appellant and R.C. When R.C. stood up he stated that appellant had attacked him. Appellant replied, “No, you knocked my phone out of my hand and hit me.”

M.M., the supervisor, stated that he witnessed appellant and R.C. standing apart after the incident and that both men stated that the other had initiated the attack. He recalled that appellant had asked him seven minutes earlier to use one of the offices to conduct union business. M.M. denied the request, but told appellant to ask another supervisor, B.W., if he could use the conference room.

Appellant’s description of the incident in an undated threat assessment date entry template indicated that he was reviewing a grievance issue with R.C. when R.C. knocked the telephone out of his hand. When he went to pick up his telephone, he was “cold-cocked” by R.C. to his lower jaw. R.C. then fell and continued to swing and kick until he was able to get on top of him in an attempt to restrain him. Appellant then called for assistance and another employee came in. He also called for Supervisor M.M. to come to the room.

In a May 17, 2017 statement, G.L., the transportation/networks manager, stated that appellant was a union steward and R.C. was a constituent of the union. She stated that she was aware of disagreements between the two prior to the March 16, 2017 physical altercation, because R.C. was less than happy with union representation on cases he brought to their attention. However, G.L. did not believe it to be directed solely toward appellant.

In a March 21, 2017 statement, appellant stated that he had asked R.C. if they could meet to discuss the status of a letter of warning. As he was reading a text message to him from his cell phone, R.C. got up from his chair and knocked his cell phone out of his hand, causing it to fall to the floor. As appellant bent down to retrieve the cell phone, R.C. hit him on the left side of his face with a closed fist. At that point, they ended up on the floor, with him on top of R.C. As appellant was trying to restrain him, R.C. hit him three or four more times once on the left side of his head and ear and kicked him in the ribs. He stated that the whole time, he was shouting to a passerby to get Supervisor M.M. At that point another driver came into the room and separated them. Then Supervisor M.M. appeared in the office. He went out to the hallway and told Supervisor M.M. that R.C. had assaulted him. R.C. came out of the office and told Supervisor M.M. that he was the one who threw the first punch. Appellant told R.C. that he was lying as it was R.C. who threw the first punch.

Also received were a March 27, 2017 letter scheduling a predisciplinary interview, an April 4, 2017 summons addressed to appellant pertaining to a charge for assault and battery, a March 23, 2017 medical report from Dr. Alexander, and an April 18, 2017 return to duty medical certification.

By decision dated May 25, 2017, OWCP denied appellant's claim that he sustained a work-related injury on March 16, 2017 as it did not occur in the performance of duty, as alleged. It found that there was a personal relationship between appellant and the employee and that the March 16, 2017 physical altercation was imported into the workplace from complaints of a personal nature and, thus, was not covered under FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim, including the fact that the individual is an employee of the United States within the meaning of FECA, that the claim was filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.³ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁴

The phrase sustained while in the performance of duty is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, arising out of and in the course of employment.⁵ In the course of employment relates to the elements of time, place, and work activity.⁶ To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in his or her master's business, at a place when he or she may reasonably be expected to be in connection with his or her employment, and while he or she was reasonably fulfilling the duties of the employment, or engaged in doing something incidental thereto. As to the phrase in the course of employment, the Board has accepted the general rule of workers' compensation law that, as to employees having fixed hours and places of work, injuries occurring on the premises of the employing establishment, while the employees are going to and from work, before or after work hours or at lunch time, are compensable.⁷

Assaults arise out of the employment either if the risk of assault is increased because of the nature or setting of the work or if the reason for the assault was a quarrel having its origin in the

³ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁴ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

⁵ This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Bernard D. Blum*, 1 ECAB 1 (1947).

⁶ *D.L.*, 58 ECAB 667 (2007).

⁷ *See Idalaine L. Hollins-Williamson*, 55 ECAB 655 (2004).

work. Assaults for private reasons do not arise out of the employment unless, by facilitating an assault that would not otherwise be made, the employment becomes a contributing factor.⁸

The Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.⁹ Attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment.¹⁰

The Board has recognized an exception to this general rule when employees performing representational functions, which entitle them to official time, are injured when in the performance of duty.¹¹ The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of a union official may simultaneously serve the interest of the employer.¹² OWCP's procedures indicate that representational functions include authorized activities undertaken by employees on behalf of other employees pursuant to such employees' right to representation under statute, regulation, executive order, or terms of a collective bargaining agreement.¹³

ANALYSIS

The Board finds that this case is not in posture for decision.

Appellant filed a claim for injuries sustained on March 16, 2017 when he was involved in a physical altercation at work with another employee. At the time of the physical altercation, appellant claimed he was reviewing grievance issues with the employee in his capacity as a shop steward/union representative. As discussed, time, place, and manner are not alone sufficient to establish entitlement to compensation. Appellant must also establish that his injury arose out of his employment or that a factor of his employment gave rise to the physical altercation.¹⁴

⁸ *S.S.*, Docket No. 13-0318 (issued March 26, 2013).

⁹ *Jimmy E. Norred*, 36 ECAB 726 (1985).

¹⁰ *C.M.*, Docket No. 10-0753 (issued December 15, 2010).

¹¹ *See R.F.*, Docket No. 14-0770 (issued September 29, 2015).

¹² *Marie Boylan*, 45 ECAB 338, 342-43 (1994).

¹³ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

¹⁴ *See B.T.*, Docket No. 15-0786 (issued June 10, 2015).

OWCP procedures discuss union representational functions and official time.¹⁵ There are specific guidelines for case development when union activity may be involved:

“When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted official time or, in emergency cases, would have been granted ‘official time’ if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty. This includes Postal Service employees who are ‘on the clock’ while performing representational activities under the National Agreement.¹⁶

“If [an] agency states that the employee was not performing an activity for which official time is allowed, [OWCP] should issue a letter warning [appellant] that the case will be denied unless additional information is provided, and allowing [30] days for a response. If there is no timely response from [appellant], a formal decision should be issued on the grounds that [appellant] is not in the performance of duty.

“If [appellant] provides evidence contradicting the [employing establishment’s] position, the official superior should be asked to reply to his evidence.... [OWCP] will accept the ruling of the [employing establishment] as to whether a representative was entitled to official time unless the ruling is later overturned by a duly authorized appellate body.”¹⁷

OWCP found that appellant had not established that his alleged injury occurred in the performance of duty as there was a personal relationship between appellant and the employee and that March 16, 2017 physical altercation was imported into the workplace from complaints of a personal nature. It thus concluded that appellant’s alleged injury was not compensable under FECA.¹⁸ The evidence of record does not substantiate the physical altercation was imported into the workplace, but rather that the evidence suggests that it occurred during a discussion of a union grievance. OWCP, however, never clarified with the employing establishment, pursuant to its procedures, whether appellant was performing a representational function as a union steward at the time of the assault. It should have sought evidence from the employing establishment as to whether appellant was performing representational functions that would bring the alleged altercation within the performance of duty. The procedures noted above provide specific guidelines as to what constitutes representational functions and official time. If the employing establishment found that appellant was not performing representational functions, appellant should have been advised of the finding and provided an opportunity to submit relevant evidence on the

¹⁵ *Supra* note 13.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Supra* note 1.

issue. Failing the submission of such evidence, the employing establishment's position that appellant was not in a representational capacity would determine the outcome of that issue.¹⁹

Accordingly, on remand OWCP shall obtain further evidence to clarify if appellant was performing a representational function as a union steward at the time of the assault. After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 25, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 13, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁹ See *R.F.*, Docket No. 12-1816 (issued May 21, 2013).